

STATE OF WISCONSIN
SUPREME COURT

EMPLOYEE TRUST FUNDS BOARD,
THE DEPARTMENT OF EMPLOYEE TRUST
FUNDS and ERIC O. STANCHFIELD,
Secretary of the Department of
Employee Trust Funds,

Petitioners,

v.

Case No.

GEORGE LIGHTBOURN, Acting
Secretary of the Wisconsin
Department of Administration,
JACK C. VOIGHT, Wisconsin
State Treasurer,

Respondents.

**PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION
AND FOR LEAVE TO HAVE PETITION STAND AS A COMPLAINT
SEEKING DECLARATORY JUDGMENT**

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Dated: December 23, 1999

Petitioners, by their attorneys, hereby petition the Wisconsin Supreme Court for leave to commence an original action, pursuant to Article VII, section 3 of the Wisconsin Constitution, section 809.70, Stats., section 27(4t) of 1999 Assembly Bill 495, and section 806.04, Stats., the Uniform Declaratory Judgment Act. Petitioners further request that the following allegations stand as their Complaint for Declaratory Judgment.

PRELIMINARY STATEMENT

1. This is a petition for leave to commence an original action in the Supreme Court. Petitioners administer the Wisconsin Retirement System ("WRS"). Chapter 40, Stats., creates a public employe trust fund ("Trust Fund"), which is operated under the direction of the Department of Employee Trust Funds ("ETF"). As fiduciaries of the Trust Fund, Petitioners' must protect the security of the Trust Fund and each participant's beneficial interest in the Trust Fund. 1999 Assembly Bill 495 has been signed by Wisconsin Governor Tommy Thompson and will become effective as

1999 Wis. Act 11 the day after its publication (hereinafter "AB 495"). AB 495 makes several changes to the WRS and the manner in which ETF will be required to administer the Trust Fund. Petitioners can only implement lawful changes to the WRS and the Trust Fund as part of their fiduciary duties. Petitioners have questions concerning the constitutionality of some of the provisions in AB 495 and questions concerning the correct interpretation and implementation of AB 495. For these reasons, and to fulfill their fiduciary duties to protect the security of the Trust Fund, Petitioners seek a declaratory judgment as to the constitutionality of portions of AB 495.

2. Petitioners also seek preliminary relief by issuance of a preliminary injunction or a writ of prohibition necessary in aid of the Supreme Court's jurisdiction, pursuant to Article VII, section 3(2) of the Wisconsin Constitution and section 751.07, Stats., enjoining and prohibiting Petitioners and Respondents from taking those actions directed by AB 495 and AB 584, which has also been signed by Wisconsin Governor Tommy Thompson and will become effective as 1999 Wis.

Act 12 the day after its publication (hereinafter "AB 584"), or otherwise implementing or enforcing AB 495 or AB 584, after they have become effective, until such time as the Supreme Court rules on the constitutionality of AB 495 and declares which of its provisions, if any, should be implemented and enforced.¹ Notwithstanding the foregoing, Petitioners request that they not be enjoined from taking such contingent and preparatory measures toward implementation of AB 495 as they deem appropriate in their discretion and consistent with their fiduciary and other duties and responsibilities for administering the terms of the Trust Fund so as to allow for the smoothest transition, and least amount of disruption to Trust Fund participants, should some or all of the provisions of AB 495 be declared valid.

¹ One of the changes to the WRS made by AB 495 was to increase the value of death benefits provided to a beneficiary of a participating employee. An unintended effect of the death benefit change was that an estate, or any other unnatural person, could not be named the beneficiary for a participating employee. AB 584 corrects that unintended effect by permitting an estate or other unnatural person to be the beneficiary of a participating employee. Thus, AB 495 and AB 584 are treated hereafter as a package of legislation that together must be enjoined until the Supreme Court rules on the provisions of AB 495.

PARTIES

3. Petitioner Employee Trust Funds Board (the "Board"), is a body of trustees which operates and administers the Trust Fund. The Board was created by Subchapter I of Chapter 40, Wis. Stats., with purposes, powers and duties defined in Chapter 40, Stats., and with its principle offices located at 801 W. Badger Rd, Madison, Wisconsin.

4. Petitioner ETF is an agency of the State of Wisconsin created by Chapter 15, Stats. ETF operates under the direction and supervision of the Board, pursuant to Chapter 40, Wis. Stats., and has a principle place of business at 801 W. Badger Road, Madison, Wisconsin.

5. Petitioner Eric O. Stanchfield is the Secretary of ETF, with principle business address at 801 W. Badger Rd., Madison, Wisconsin. Petitioner Stanchfield is also a participant in the WRS.

6. Respondent Jack C. Voight is the Wisconsin State Treasurer, whose current address is 1 S. Pinckney Street, 5th Floor, Madison, Wisconsin.

7. Respondent George Lightbourn is the Acting Secretary of the Wisconsin Department of Administration whose current address is 101 East Wilson Street, 10th Floor, Madison, Wisconsin 53702.

JURISDICTION

8. There are currently approximately 454,000 participants in the WRS, including approximately 249,000 active employees, 101,000 annuitants and 104,000 inactive employees who remain participants in the WRS.

9. The State of Wisconsin was one of 1,194 different employers which, as of December 31, 1998, participated in the WRS. These employers included counties, cities, towns, villages, school districts, library districts, other governmental units and instrumentalities of two or more units of government created within the State of Wisconsin. See secs. 40.02(28) and 40.02(54), Stats.

10. Each of the 454,000 participants in the WRS and each of the 1,194 employers included in the WRS will be affected by the implementation of Act 495. Among other effects, AB 495 involves the transfer of \$4

billion from a smoothing account within the Trust Fund for uses other than intended by the smoothing account. Moreover, approximately \$647 million of the \$4 billion being transferred from the smoothing account will be diverted to permit \$200 million to be used for the benefit of employers for non-Trust Fund purposes. Furthermore, AB 495 removes the discretion expressly provided to the Board to set certain actuarial assumptions which are critical to the administration of the Trust Fund.

11. Original jurisdiction of the Supreme Court is appropriate because the case is of critical importance to the current approximately 454,000 WRS participants and all future WRS participants and warrants the exercise of jurisdiction publici juris. The issues raised in this petition are of such urgency that original jurisdiction of the Supreme Court is essential. As soon as AB 495 becomes effective, ETF will be required to take immediate steps toward its implementation. If implementation of AB 495 is not enjoined and original jurisdiction is not accepted by the Supreme Court, uncertainty as to the proper

administration of the Trust Fund will continue and threaten retirement decisions by those WRS participants who have reached elective retirement age. Moreover, actions undertaken pursuant to AB 495 might require reversal, which would cause substantial hardship on WRS participants who received increased benefits and then were required to return pension funds that might have, in whole or in part, already been spent. In some instances, the death of participants may prevent any recovery by the Trust Fund.

12. The legislature has requested the Supreme Court to accept the original jurisdiction of any action relating to the implementation of AB 495. AB 495, section 27(4t) provides:

REQUEST THAT SUPREME COURT TAKE ORIGINAL JURISDICTION. Considering the implementation of this act a matter of high public importance, the legislature requests that the supreme court take jurisdiction of any original action relating to the implementation of this act.

Furthermore, on information and belief, the executive branch, through Respondents, has agreed not to oppose

acceptance of original jurisdiction by the Supreme Court.

STATEMENT OF ISSUES

13. The issues which require the Supreme Court's attention in the exercise of its original jurisdiction include the following:

(a) Whether the use of \$647 million to create the \$200 million employer credit to be used to pay unfunded prior service and contribution debts owed by employers to the WRS:

(i) violates section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(b) Whether the change in assumptions of section 40.02(7), Stats., required by AB 495, sections 5 and 28(1), constitute an usurpation of the Board's discretion and,

(i) violates section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(c) Whether the recognition of \$4 billion from the Transaction Amortization Account ("TAA") for use other than a smoothing mechanism in contravention of the purpose of the TAA

(i) is a violation of section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(d) Whether the inability of approximately 51,000 inactive WRS participants to share in the \$4 billion TAA transfer and their receipt of reduced annuity dividends because of the TAA transfer

(i) is a violation of section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(e) Whether increasing the formula multiplier used in calculating retirement benefits using the internal funding sources provided in AB 495, but excluding approximately 51,000 inactive WRS participants from the increase when they retire violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

(f) Whether raising the final average earnings cap by 5% under section 40.23(2m)(b), Stats., but excluding protective occupation participants using the internal funding sources provided in AB 495, from sharing in the increase violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

THE WISCONSIN RETIREMENT SYSTEM

14. The WRS is a hybrid plan with characteristics of both a defined benefit plan and a defined contribution plan. The WRS is a defined benefit plan to the extent that its participants are ensured they will receive a specific retirement benefit calculated as a formula involving their final average monthly earnings multiplied by the years of creditable service. Different percentage multipliers are used for calculating the formula benefits to be paid to different groups of participating employees. The WRS is also a defined contribution plan to the extent that participating employees and employers pay a percentage of payroll as required contributions into the Trust Fund. Moreover, individual accounts are maintained for each non-annuitant participant, interest is credited to those participant accounts, and there is a guarantee that the minimum annuity benefit will equal the sum of the participant's accumulated contributions plus an amount from the employer reserve equal to the participant's accumulated required contributions. Sections 40.05(1), 40.23(1)(a)(2m) and (3), Stats.

15. Within the Trust Fund, there is a fixed retirement investment trust ("FRIT"). Section 40.04(3), Stats. The FRIT receives funds from three sources: (1) contributions from participating employees; (2) contributions from participating employers; and (3) investment earnings on the employee and employer contributions.

16. There are a number of accounts within the FRIT, four of which are significant to this proceeding. First, there is an employee accumulation reserve account, which holds funds related to employee contributions. Section 40.04(4), Stats. Second, there is an employer accumulation reserve account, which holds funds related to employer contributions. Section 40.04(5), Stats. Third, there is an annuity reserve account, which holds funds sufficient to make annuity payments to those retiring public employees who receive their retirement benefits on an installment basis. Section 40.04(6), Stats. When an employee retires and elects to take an annuity, the employee and employer accumulation reserves transfer to the annuity reserve an amount equal to the present value of the annuity.

Section 40.04(6), Stats. Fourth, there is the TAA.

Section 40.04(3), Stats.

17. Within the employee accumulation reserve in the FRIT, each participant of the WRS has a separate account maintained. Section 40.04(4)(a), Stats. In contrast, the employer accumulation reserve within the FRIT is maintained without regard to the identity of any individual employer. Section 40.04(5), Stats. The sole purpose of the employer accumulation reserve is to fund benefits to WRS participants and their beneficiaries. Employers do not have vested interests in any WRS funds. The money in the employer accumulation reserve is dedicated solely to provide for the retirement benefits of WRS participants. Section 40.04(5)(c), Stats. WRS participants and their beneficiaries have a direct property and contractual beneficial interest in the funds maintained in the employer accumulation reserve within the FRIT.

18. In addition to the annually required employer contributions, employers are required to pay contributions for any unfunded prior service liability that is owed to the WRS as a result of past benefit

improvements under the WRS that were not fully funded at the time of their creation and of recognizing prior service earned by employees before the employer became a covered employer under the WRS. Employer contribution rates for the payment of unfunded prior service liability are currently amortized over 40 years. In other words, employers make payments to the WRS for the unfunded prior service liability debt employers owe to the WRS. Section 40.05(2)(b), Stats. The employer must continue to make contributions toward the employer's unfunded prior service liability until the entire debt has been paid to the WRS. Section 40.05(2)(bm), Stats.

19. The TAA is an accounting mechanism which allows the three reserve accounts to spread over time the recognition of gain or loss on investments, thereby partially insulating WRS participants from the fluctuations of the investment marketplace. The purpose of the TAA is to smooth fluctuations in marketplace investment gains and losses and not to pay gains or debit losses to any particular WRS participants or groups of participants. The TAA is an

accounting mechanism to improve equity among WRS participants in the effect of the investment gains and losses on their retirement accounts. Its purpose was described in the Report of Joint Survey Committee on Retirement Systems, Appendix to 1973 Senate Bill 449, as follows:

Under [the law before enactment of the TAA] each realized capital gain or loss of a fixed annuity retirement fund is reflected fully in the investment experience for the year in which the gain or loss is realized. This results in several significant problems:

a. The investment board may well feel restrained from disposing of a specific holding at a current loss, despite the fact that the proceeds from the disposition could be reinvested so as to recover the loss, achieve a higher rate of current return, and in total produce a net advantage for the retirement fund.

b. Individual employees who terminate their employment or die following a year in which the retirement fund experienced extreme net capital gains or losses will suffer an unwarranted increase or decrease in the value of their retirement accounts. While exact individual equity is hard to achieve in any group enterprise such as a retirement program, this

is one area in which improved equity can be achieved.

Under this bill every capital gain or loss realized under the fixed annuity investment trust would be credited (or debited) to a special holding account, the proceeds of which would be paid out to the several retirement funds or systems at 7% [now 20%] each year. Thus each capital gain or loss would be spread over a period of about 14 years [now 5 years] rather than falling in total in one year. (Emphasis added.)

20. Every year, each of the FRIT's three reserve accounts is credited proportionally with 20% of the TAA balance. Section 40.04(3)(a), Stats.

21. Respondent Voight is the treasurer of the Trust Fund. Section 40.03(4), Stats.

22. The Board is expressly responsible for, and authorized to, select and retain the actuary and actuarial firm which shall perform all actuarial services necessary for the operation and control of the Trust Fund. Section 40.03(1)(d), Stats. The Board alone is authorized to approve the contribution rates and actuarial assumptions determined by the actuary, expressly including the assumed interest rate and the

assumptions for future changes in employee salary rates. Section 40.03(1)(e), Stats. It is these actuarial assumptions that determine employee and employer contributions to the Trust Fund and, accordingly, the actuarial assumptions must be based on the actual experience of the WRS as identified by the actuary. Section 40.03(5)(b), Stats.

23. The monies held in the Trust Fund are not state funds. Trust Fund money has been irrevocably placed in trust for the benefit of WRS participants and the State cannot direct the use of such money for non-trust purposes.

PRINCIPLES PROTECTING THE WRS

24. WRS participants have a property and contractual right in "the proper use of the earnings" in the Trust Fund. Ass'n of State Prosecutors v. Milwaukee Cty., 199 Wis. 2d 549, 559, 544 N.W.2d 888 (1996). The "legislature ... [is] not free to spend or appropriate the earnings of the fund except in a manner authorized by statute" Id.

25. "The WRS's ability to meet its obligations can be jeopardized where funds are taken from it, since

every dime is arguably part of a management strategy dependent upon spreading the [Trust Fund's] monies as broadly as possible." Id. at 560. "Government takings do not become exempt from due process requirements simply because they may be actuarially insignificant." Id. at 561. "While the specific transfer of Trust Funds ... may not immediately threaten the benefits of vested [WRS] beneficiaries, the precedent set by such a transfer certainly could." Id. at 562.

26. Even though a change to the WRS constitutes a taking of a property interest, the "legislature should retain a limited power to adjust or amend [the WRS] in certain situations, such as when it is necessary to preserve the actuarial soundness of a plan or to salvage financially troubled funds." Id. at 563 (emphasis added). In short, in such circumstances "legislative intervention [must] be needed." Id. at 564. It is not enough that legislative intervention in the WRS not create actuarial unsoundness or even be deemed to be actuarially sound. Intervention that causes a taking must instead be "needed" and

"necessary to protect actuarial soundness." Id. at 563-64.

27. Where an exclusive grant of discretionary authority has been given statutorily to the ETF Board, WRS participants have a property interest in the preservation of the Board's authority. Retired Teachers Ass'n. v. The Employe Trust Funds Bd., 207 Wis. 2d 1, 558 N.W.2d 83 (1997). WRS participants have a property right in the investment earnings of the Trust Fund and a property right to have those investment earnings distributed in the manner set by statute. Id. at 23-25.

CHANGES TO THE WRS MADE BY AB 495

28. AB 495 was introduced in the Assembly on October 1, 1999. On October 6, 1999, Assembly Amendment 3 was proposed, which provided:

NONSEVERABILITY. Notwithstanding section 990.001(11) of the statutes, if a court finds that any provision of this act is unconstitutional, the entire act is void.

Assembly Amendment 3 was rejected on October 6, 1999. AB 495 was passed in both the Assembly and the Senate

on October 6, 1999, just five days after it had been introduced.

29. AB 495 provides that, on December 31, 1999, \$4,000,000,000 is to be distributed from the TAA to the employer, employee and annuity reserve accounts in the FRIT in an amount equal to the percentage of the total distribution determined by dividing each reserve's account balance on the prior January 1 by the total balance of the FRIT on the prior January 1. The amount received by the employee reserve account is to be divided among each participant's account's balance. AB 495, section 27(1)(a).

30. The early recognition of \$4 billion from the TAA is not to serve the smoothing purpose for which the TAA exists. Instead, it is to serve as an internal funding mechanism for benefits created by AB 495 and for benefits expressly provided to employers, who do not have beneficial interests in the Trust Fund, including the TAA.

31. Currently, when a participant in the WRS terminates covered employment and becomes eligible for a retirement annuity, one of the ways in which the

amount of his or her annuity is determined is by multiplying the participant's final average earnings by the participant's years of creditable service and by a percentage multiplier. For a protective occupation participant who is covered by Social Security, an elected official and an executive participating employee, the percentage multiplier is 2%. For a protective occupation participant who is not covered by Social Security, the percentage multiplier is 2.5%. For all other participants in the WRS, the percentage multiplier is 1.6%. Sections 40.23(2m)(e)1, 2, 3 and 4, Stats.

32. AB 495 increases the percentage multiplier for all classes of participants in the WRS for creditable service that is performed before January 1, 2000. For a protective occupation participant who is covered by Social Security, an elected official and an executive participating employee, the percentage multiplier is increased to 2.165%. For a protective occupation participant who is not covered by Social Security, the percentage multiplier is increased to 2.665%. For all other participants in the WRS, the

percentage multiplier is increased to 1.765%. The increase in the percentage multiplier first applies to the calculation of retirement benefits for individuals who are participating employees in the WRS on January 1, 2000. For all creditable service that is performed on or after January 1, 2000, however, AB 495 provides that the current law percentage multiplier will apply. AB 495, sections 17, 18, 19 and 20.

33. The result of transferring \$4 billion from the TAA to fund, in part, benefits resulting from an increase in multiplier applied to services prior to January 1, 2000, means that the \$4 billion will not be shared equitably by WRS participants. Those participants with longer creditable service as of January 1, 2000, will receive more of the \$4 billion by the formula increase. That result is directly contrary to the purpose of the TAA, which was to increase individual equitable sharing in interest gains generated in the Trust Fund through the smoothing mechanism of the TAA rather than to have investment earnings concentrated in any one year, which is the result of the \$4 billion TAA transfer.

34. There are approximately 104,000 current WRS participants who will not be active employees on January 1, 2000. Under AB 495, approximately 51,000 of these inactive, but current WRS participants will not be entitled to have the formula increases applied to their pre-January 1, 2000 creditable service when they retire. AB 495, section 28(2).

35. Individual accounts in the employee accumulation reserve are credited with earnings based upon the effective rate, which includes investment earnings for the calendar year. Section 40.02(23)(a), Stats. The \$4 billion TAA transfer provides that it is to be credited "to participants' accounts based on their account balances as of January 1, 1999, pursuant to section 40.04(4)(a)2. and 2g. of the statutes." AB 495, section 27(1)(c). Section 40.04(4)(a)2., Stats., provides that some inactive WRS participants are to be credited with interest at the assumed rate of 5% rather than at the effective rate. Accordingly, because the investment earnings used to calculate the effective rate for the 1999 calendar year includes the \$4 billion of earnings distributed from the TAA under AB 495,

certain inactive WRS participants will not receive any of the \$4 billion. Moreover, when such an inactive WRS participant retires, his or her subsequent annuity account dividends will be reduced because the TAA will have been reduced by \$4 billion. In addition to the loss of all WRS participants in having the \$4 billion taken from the TAA and used for purposes contrary to the smoothing and equitable earnings distribution intent of the TAA, those inactive participants will have incurred a direct loss by the TAA transfer.

36. There are approximately 51,000 inactive WRS participants who are credited with interest at the assumed rate of 5% annually rather than at the effective rate and who will retire rather than electing to take a separation benefit or die before reaching retirement age.

37. AB 495 eliminates the TAA over a five year period and replaces it with another accounting mechanism known as a market recognition account ("MRA") that is to be used for distributing the total market value investment returns earned by the FRIT. The MRA serves a smoothing purpose as did the TAA but

it distributes investment earnings and losses in a manner more directly related to market effects. The total amount of the TAA is frozen and distributed over five years. The only exception is that before freezing the TAA, the \$4 billion is transferred out for internal funding of benefits provided under AB 495, including benefits to employers for non-Trust Fund purposes. See AB 495, sections 8 and 9.

38. The purpose of changing the smoothing, accounting mechanism from the TAA to the MRA is to distribute Trust Fund investment earnings and losses on a schedule more consistent with market cycles. This can, and will, be achieved through the phase-out of the TAA and transition to the MRA, which is a proper trust purpose and consistent with the smoothing flexibility necessary for Trust Fund investment distributions. That all can be accomplished, however, without first making a one-time, \$4 billion transfer from the TAA to internally fund benefits.

39. The following charts demonstrate the manner in which the TAA would be distributed as of December 31, 1999, assuming a \$15 billion TAA balance, under

current law, under AB 495, and under AB 495 with a transition to the MRA but without the \$4 billion transfer.

**TAA DISTRIBUTION SCENARIOS
ASSUMING \$15 BILLION TAA AS OF DECEMBER 31, 1999
(billion \$)²**

Current Law

	1999	2000	2001	2002	2003	2004
Pre-Distribution TAA Balance	15.00	12.00	9.60	7.68	6.14	4.91
20% Annual Distribution	3.00	2.40	1.92	1.54	1.23	0.98
One-Time Distribution	0.00					
TAA Phase-Out	0.00					
Ending Balance	12.00	9.60	7.68	6.14	4.91	3.93

AB 495

	1999	2000	2001	2002	2003	2004
Pre-Distribution TAA Balance	15.00	8.00	6.40	4.80	3.20	1.60
20% Annual Distribution	3.00					
One-Time Distribution	4.00					
TAA Phase-Out	0.00	1.60	1.60	1.60	1.60	1.60
Ending Balance	8.00	6.40	4.80	3.20	1.60	0.00

²Example assures no future gains or losses after 1999.

**5 Year Transition to MRA Without any
One-Time Recognition**

	1999	2000	2001	2002	2003	2004
Pre-Distribution TAA Balance	15.00	12.00	9.60	7.20	4.80	2.40
20% Annual Distribution	3.00					
One-Time Distribution	0.00					
TAA Phase-Out	0.00	2.40	2.40	2.40	2.40	2.40
Ending Balance	12.00	9.60	7.20	4.80	2.40	0.00

40. The transition from the TAA to the MRA without the \$4 billion transfer from the TAA smoothes, and reduces, the adverse impact on participants to a much greater extent than the \$4 billion transfer, which only serves to greatly exacerbate inequities in the sharing of the \$4 billion.

41. As part of the \$4 billion TAA transfer, approximately \$647 million was used to make a direct payment to employers of Trust Fund monies. AB 495 directs that \$200 million of the amount deposited into the employer accumulation reserve be diverted to an employer credit account. To achieve that \$200 million deposit into an employer credit account, the legislature reverse engineered the amount of money that

would have to be deposited into all three accounts to generate the \$200 million employer credit account. The amount required to generate the \$200 million employer credit is approximately \$647 million.

42. The funds in the employer accumulation reserve are for the exclusive purpose of paying participant benefits. Section 40.04(5)(c), Stats. The \$200 million employer credit account nominally created within the employer accumulation reserve by AB 495 is used to pay the unfunded prior service liability debt owed by employers to the WRS. To the extent any employer does not have such a debt to the WRS, the employer is credited out of the \$200 million employer reserve credit account for employer required contributions to the WRS in future years. AB 495, section 27(1)(b).

43. The employer credit account of \$200 million is a diversion of \$200 million of Trust Fund monies, in which WRS participants have a protected property and contract right. The \$200 million is given to employers, who have no right or entitlement to the money, so that the employers can use the money to pay

either their unfunded prior service liability debt or future contribution debts to the Trust Fund. To the extent employers have an unfunded liability debt owed to the Trust Fund, \$200 million of Trust Fund monies are being used to pay that debt owed to the Trust Fund. To the extent employers have required contributions as determined by the Board and actuary, those contribution debts are being paid from the \$200 million Trust Fund monies.

44. Under current law, employee and employer contributions to the fund are based on certain assumed interest rates and assumed salary increases. The assumed interest rate set by statute is 7.5% and the assumed salary increases are set at 1.9% less than the assumed rate. Section 40.02(7), Stats. The Board may approve different rates based on the recommendations of the actuary designated by the Board. Id.

45. AB 495 increases the assumed interest rate to 8% and increases the differences between the assumed salary increases and the assumed interest rate to 3.4%. Although AB 495 leaves in place the ability of the Board, on recommendation by the actuary, to approve a

different rate "due to changed economic circumstances," it directs that the new assumptions be used "for the 2001 calendar year." AB 495, sections 5 and 28(1). Thus, the discretion of the Board, based on the recommendation of the actuary, has been limited by AB 495 because the ability to choose different rates is limited in time to after the 2001 calendar year and even then only until changed economic circumstances could be used to again invest discretion within the Board. The increase in the spread between assumed salary increases and the assumed interest rate serves to decrease the amount of contributions made to the Trust Fund. The actuary did not recommend these assumption changes to the Board and the Board did not approve them.

46. The maximum amount of an initial annuity for a WRS participant who receives an annuity that is calculated using the formula multiplier, other than a protective occupation participant, is increased by 5% of the participant's final average earnings. Section 40.23(2m)(b), Stats.; AB 495, section 16.

47. As of December 31, 1998, 17,609 active WRS participants were protective occupation participants.

POSITION OF PETITIONERS

48. The use of \$647 million to create the \$200 million employer credit to be used to pay unfunded prior service and contribution debts owed by employers to the WRS is not a proper use of Trust Fund investment earnings. The use of the \$647 million to establish the \$200 million employer credit account violates section 40.19(1), Stats.; is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

49. The changes in assumptions of section 40.02(7), Stats., required by AB 495, section 5, constitute a usurpation of the Board's discretion and,

accordingly, violates section 40.19(1), Stats.; is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

50. The recognition of \$4 billion from the TAA for use other than a smoothing mechanism in contravention of the purpose of the TAA is a violation of section 40.19(1), Stats.; is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

51. Approximately 51,000 inactive WRS participants do not share in the \$4 billion and will receive reduced annuity dividends because of the transfer of the \$4 billion from the TAA. This circumstance is a violation of section 40.19(1),

Stats.; is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

52. The transition from the TAA accounting smoothing mechanism to the MRA accounting smoothing mechanism by freezing the full amount of the TAA, without the \$4 billion transfer, would be a permitted legislative action under section 40.19(1), Stats., because it would exchange the vested benefit rights of WRS participants in the TAA with equal or greater benefits in the MRA, which is a proper trust investment smoothing device. Moreover, under the transition from the TAA to the MRA without the \$4 billion transfer from the TAA, the entire remaining balance of the TAA at the end of 1999 will be recognized over five years and available to be applied to contribution rates or benefit changes, including those created by AB 495.

53. The \$4 billion TAA transfer, the changes in assumed interest and salary rates and the \$647 million

transfer used to create the \$200 million employer credit account were not needed or necessary to preserve actuarial soundness of the Trust Fund or to salvage the Trust Fund, because it is not financially troubled.

54. The actuary's report provided to the legislature did not recommend an early recognition from the TAA. The actuary report did comment approvingly on transition from the TAA to the MRA. A copy of the Wisconsin Retirement System Actuarial Valuations of Alternate Benefit and Financing Provision, prepared for the Senate Committee on Organization, July, 1999, is attached hereto as Exhibit A.

55. Raising the final average earnings cap by 5% under section 40.23(2m)(b), Stats., but excluding protective occupation participants from the increase raises the question of whether their exclusion violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

56. Increasing the formula multiplier for creditable service prior to January 1, 2000 and using the internal funding provided in AB 495 but excluding approximately 51,000 WRS participants who are inactive

on January 1, 2000 from receiving the increases for their prior creditable service raises the question of whether their exclusion violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

REQUEST FOR RELIEF

WHEREFORE, Petitioners request that the Supreme Court declare the rights of WRS participants with regard to AB 495, as follows:

1. Declare AB 495, section 27(1)(B) unconstitutional to the extent that it transfers \$647 million from the TAA for purposes of creating the \$200 million employer credit account;
2. Declare AB 495, section 5 unconstitutional to the extent that it changes the assumed rates set forth in section 40.02(7), Stats.;
3. Declare AB 495, section 27(1)(a) unconstitutional to the extent that it directs a \$4 billion transfer from the TAA the accounts and reserves of the FRIT;
4. Declare whether raising the final average earnings cap by 5% using the internal funding sources provided in AB 495 but excluding protective occupation participants from the increase violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

5. Declare whether increasing the formula multiplier for creditable service prior to January 1, 2000 using the internal funding sources provided in AB 495 but excluding approximately 51,000 WRS participants who are inactive on January 1, 2000 from receiving the increase for their prior creditable service violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

6. Declare that the transition from the TAA to the MRA under the terms of AB 495, sections 8 and 9, to be a proper exercise of legislative authority under section 40.19(1), Stats., but without the \$4 billion transfer;

7. Sever those portions of AB 495 declared to be unconstitutional from the remaining portions of AB 495, the result of which will be that any remaining provisions will be funded by the proper transition of investment smoothing mechanisms from the TAA to the MRA and, if necessary, by future employer and employee contributions; and

8. Provide such other legal and equitable relief
as is appropriate.

Dated this _____ day of December, 1999.

WHYTE HIRSCHBOECK DUDEK SC

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